STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JUNIOR FRED BLACKSTON,

Defendant-Appellant.

UNPUBLISHED
May 2, 1997

No. 193142
Van Buren Circuit Court
LC No. 95-009511-FH

Before: Griffin, P.J., and Doctoroff and Markman, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of aiding and abetting in the commission of forgery, MCL 750.248; MSA 28.445, and aiding and abetting in the commission of uttering and publishing, MCL 750.249; MSA 28.446. Pursuant to MCL 769.11; MSA 28.1083, the trial court sentenced defendant as an habitual offender to serve two concurrent terms of eight to 28 years' imprisonment. Defendant appeals as of right from his convictions and sentence. We affirm defendant's convictions and remand for resentencing.

Defendant first argues that the prosecution failed to present sufficient evidence to convict him because it failed to establish that defendant had the requisite intent to commit either crime. We disagree. In reviewing the sufficiency of the evidence to sustain a conviction, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

MCL 767.39; MSA 28.979 provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

The crime of forgery requires proof that (1) defendant committed an act which results in the false making or alteration of an instrument and that (2) defendant had a concurrent intent to defraud or injure. *People v Grable*, 95 Mich App 20, 24; 289 NW2d 871 (1980). The crime of uttering and publishing is established by proof that (1) defendant knew that the instrument was false, (2) defendant had an intent to defraud, and (3) defendant presented the instrument for payment. *People v Dukes*, 189 Mich App 262, 265; 471 NW2d 651 (1991). Therefore, the crimes of forgery and uttering and publishing are specific intent crimes.

In order to be convicted for aiding and abetting in the commission of a specific intent crime, the aider and abettor must have had either the specific intent required of a principal of the crime or the knowledge that a principal has such intent. *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995). However, because of the difficulty in proving a defendant's state of mind, minimal circumstantial evidence is sufficient, *People v Palmer*, 42 Mich App 549, 552; 202 NW2d 536 (1972), and an aider and abettor's state of mind may be inferred from all the facts and circumstances, *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

With respect to the forgery conviction, the prosecution's chief witness testified that defendant was in the vicinity when defendant's wife, the principal, forged the check and that, immediately following the forgery, she handed the check to defendant. Although mere presence at the scene of a crime is not sufficient for the imposition of liability as an aider and abettor, *People v Youngblood*, 165 Mich App 381, 386; 418 NW2d 472 (1988), a jury can reasonably infer the requisite intent from a defendant's close association with the principal and a defendant's participation in the planning or execution of the crime, *People v Spearman*, 195 Mich App 434, 441; 491 NW2d 606 (1992). Therefore, because of the husband-wife relationship between defendant and the principal, coupled with the witness' testimony regarding defendant's actions surrounding the forgery, we conclude that a jury could reasonably infer that defendant possessed, at the time of the forgery, the specific intent to defraud or injure or, at the very least, possessed the knowledge that his wife, the principal, possessed such an intent.

With respect to the uttering and publishing conviction, another principal testified that defendant accompanied him to Hardings Market for the purpose of presenting the forged check for payment. Further, the witness testified that defendant carried the check to the store and handed it to him before he entered the store. The witness also stated that after presenting the forged check to the store cashier, he met defendant outside the store and gave him $100 of the proceeds from the fraudulently cashed check. This testimony created a reasonable inference that defendant possessed both the knowledge that the check was forged and an intent to defraud.

Accordingly, in viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could find beyond a reasonable doubt that defendant possessed the requisite intent for aiding and abetting in the forgery and the uttering and publishing of the stolen check.

Defendant next argues several instances of prosecutorial misconduct, none of which were preserved at trial by a timely objection. This Court reviews an allegation of prosecutorial misconduct for whether the defendant was denied a fair and impartial trial. *People v Kulick*, 209 Mich App 258,

259-260; 530 NW2d 163, remanded 449 Mich 851; 535 NW2d 788 (1995). However, appellate review of allegedly improper prosecutorial remarks is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Nonetheless, we find that each of defendant's claims of prosecutorial misconduct is without merit.

Defendant's first contention of prosecutorial misconduct involves the prosecutor's method of impeaching defendant and his wife, a defense witness, with evidence of prior convictions. After eliciting testimony from defendant and his wife that each had been convicted in previous proceedings of offenses involving theft or dishonesty, the prosecutor proceeded to inquire whether either had committed perjury in those previous proceedings. While defendant responded that he had not, defendant's wife responded that she had.

MRE 608(b) provides, in pertinent part, as follows:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

Whether a witness committed perjury in a previous proceeding is probative of truthfulness or untruthfulness; thus, pursuant to MRE 608(b), no error occurred with respect to this line of questioning.

Defendant next argues that the prosecutor impermissibly questioned his chief alibi witness, defendant's wife, regarding her failure to disclose her involvement in the crimes for which defendant was presently on trial until her recent guilty pleas. During defendant's trial, she testified that she was solely responsible for the instant offenses and that defendant played no part in assisting her to commit the crimes. Defendant contends that the prosecutor's line of questioning was impermissible because his wife had the right to defend herself against the charges that had been filed against her.

The constitutional privilege against self-incrimination and the right of due process restrict the use of a defendant's silence in a criminal trial, *People v Sutton* (*After Remand*), 436 Mich 575, 592; 464 NW2d 276, amended 437 Mich 1208 (1990); however, these considerations do not extend to an ordinary witness such as defendant's wife. A prosecutor is permitted to question an alibi witness regarding why she did not come forward with exculpatory information before trial. *People v Phillips*, 217 Mich App 489, 494; 552 NW2d 487 (1996). Defendant's contention that his wife had legitimate reasons for not coming forward with the information earlier could have been brought out and explained through defense counsel's direct or redirect examination of defendant's wife. See *id*. Thus, no error occurred with respect to this line of questioning.

Defendant next argues that the prosecution impermissibly questioned a witness regarding illegal drug use by defendant and others at the time of the instant offenses. First, we note that the information

with respect to defendant's drug use came from the witness in the form of an unresponsive answer. When a witness gives an unresponsive answer containing inadmissible evidence, the case must be very peculiar and strong to justify reversal, *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

Further, in *People v Scholl*, 453 Mich 730, 741; 556 NW2d 851 (1996), our Supreme Court stated, "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." Thus, the presence of drugs during the commission of the crimes could have affected the memory or behavior of anyone who used the drugs, including defendant and others involved in the offenses. In addition, "[t]he more the jurors knew about the full transaction, the better equipped they were to perform their sworn duty." *Id*. at 742. For these reasons, we hold that no error requiring reversal occurred in the admission of the testimony regarding drug use at the time of the offenses.

Defendant also argues that the prosecutor engaged in misconduct in eliciting from his chief witness that the witness had entered into a plea bargain that included a requirement that he testify truthfully, thereby placing the prestige of the prosecutor's office behind the witness' testimony. We disagree.

Although a prosecutor may not vouch for the credibility of a witness or suggest that the government has some special knowledge that the witness is testifying truthfully, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), this Court has held that a plea agreement containing a promise of truthfulness is inadmissible only if the prosecutor suggests that "the government had some special knowledge, not known to the jury, that the witness was testifying truthfully," *People v Buschard*, 109 Mich App 306, 316; 311 NW2d 759 (1981), vacated and remanded 417 Mich 996; 334 NW2d 376 (1983), aff'd on remand, 129 Mich App 160, 165; 341 NW2d 260 (1983). Because in the present case the prosecutor never suggested that he had some special knowledge that the witness was testifying truthfully, no error requiring reversal occurred in the disclosure of the plea agreement.

Next, defendant argues that his trial counsel's failure to preserve the above-discussed allegations of error amounted to ineffective assistance of trial counsel. However, inasmuch as defendant's contentions of error are without merit, his trial counsel could not have been ineffective for failing to preserve the alleged errors for review because counsel is not required to argue a frivolous or meritless claim. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Finally, defendant argues that the trial court failed to give defendant an opportunity to allocute at sentencing. We agree.

MCR 6.425(D) provides in pertinent part as follows:

> (2) Sentencing Procedure. . . . At sentencing the court, complying on the record, must:
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> * * *

(b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule (D)(3),

(c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence.

Our Supreme Court has stated that strict compliance with the rule providing for allocution is required and thus the sentencing court must ask the defendant separately whether the defendant wishes to address the court before sentencing. *People v Berry*, 409 Mich 774, 781; 298 NW2d 434 (1980). Further, resentencing is mandated where the court fails to strictly comply with the provisions of the rule. *People v Lowe*, 172 Mich App 347, 351; 431 NW2d 257 (1988).

In the instant case, our review of the record reveals that the sentencing court complied with MCR 6.425(D)(2)(b) when it asked defendant before sentencing whether he had any "comments, objections, or corrections" with respect to the presentence report. However, this inquiry was not broad enough to encompass defendant's allocution rights pursuant to MCR 6.425(D)(2)(c). The language of MCR 6.425(D)(2)(b) reveals that its purpose is to give each party an opportunity to challenge the accuracy of the presentence report so as to ensure that any challenges are properly resolved pursuant to MCR 6.425(D)(3). However, allocution with respect to MCR 6.425(D)(2)(c) serves an entirely different purpose. The policy behind MCR 6.425(D)(2)(c) is to ensure that a sentencing court avoids "forming sentencing decisions until after the defendant has been allowed the opportunity to make whatever statements he wishes to make in mitigation, extenuation, or justification of the crime for which sentence is being imposed." *People v Parks*, 183 Mich App 647, 653-654; 455 NW2d 368 (1990). Therefore, because strict compliance with the court rule is required, defendant's sentence must be vacated, and the case remanded to the trial court for resentencing. Before resentencing, the trial court must provide defendant an opportunity to allocute pursuant to MCR 6.425(D)(2)(c).

Because resentencing is warranted, defendant's further contentions regarding his sentence need not be addressed.

We affirm defendant's convictions and remand for resentencing. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Martin M. Doctoroff
/s/ Stephen J. Markman